

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHARLES LOWE, JR.,

Defendant-Appellee.

UNPUBLISHED

December 18, 2003

No. 242818

Oakland Circuit Court

LC No. 01-180979-FH

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the order dismissing charges of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of marijuana, MCL 333.7403(2)(d). We vacate the order of dismissal and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with possession with intent to deliver marijuana and possession of marijuana, based on an arrest that occurred on May 23, 2001. At the preliminary examination, Sergeant Robert Ford testified that when he approached the vehicle in which defendant and another man were sitting, he saw a “blunt” cigarette with marijuana inside in the ashtray. Defendant was placed under arrest, and the occupants were removed from the car. Sgt. Ford then looked inside the vehicle and observed two baggies that contained what appeared to be marijuana near the console. There were six separate baggies inside one of the large baggies, each containing what appeared to be \$20 to \$25 street value quantities. On cross-examination, Sgt. Ford described the blunt as being one inch long and one-quarter inch wide. The district court found that the officer’s observations were sufficient to support his subsequent actions, and bound defendant over on both charges.

The circuit court granted defendant’s motion to inspect the evidence, and it appears that the court and counsel viewed the evidence on February 2, 2002. Pursuant to defendant’s motion, an evidentiary hearing was held on May 15, 2002. At the start of the hearing, a question was raised concerning the condition of the evidence. The “blunt” cigarette found in the ashtray that was the basis for the arrest had disintegrated. Defendant maintained that the deterioration of the evidence denied him the opportunity to challenge the district court’s finding of probable cause, and he was entitled to dismissal of the charges. The trial court agreed, and dismissed the case.

While defendant argues that the court's decision was tantamount to granting a motion to quash due to the insufficiency of the evidence, the court did not proceed with the evidentiary hearing, and made no finding as to probable cause. The basis for the court's decision was not enunciated on the record.

If the basis for the court's decision was the violation of defendant's due process rights by the destruction of evidence, the decision is unsupported because there is no allegation that the police acted intentionally or in bad faith in allowing the disintegration of the evidence. Where potentially useful evidence is lost, there must be a finding of bad faith on the part of the police to establish a violation of defendant's due process rights. *People v Leigh*, 182 Mich App 96; 451 NW2d 512 (1989).

We vacate the court's order of dismissal and remand for further proceedings. The court erred in dismissing the case without addressing the probable cause issue. On remand, the court shall conduct an evidentiary hearing addressing the issue of probable cause. The court shall consider the testimony of the witnesses and its recollection, if any, of its own view of the "blunt." The court shall then make a determination regarding probable cause on the record made before it.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White